and to damages and the amount involved is substantial" and on this it was submitted that this was a proper case for the applicant to appear and argue the said appeal for the appellants.

The parties interested in the application namely the Attorney-General, the Law Society and the plaintiffs/respondents, having been duly served appeared each by counsel on Friday, February 9, 1979 and, as does not happen often in these applications, were united in objecting to the application.

The Law Society contended that (1) the Bar is now more than capable of handling such appeals, (2) if such ad hoc admissions were allowed it would not conduce to the fostering of a strong Bar and (3) this is not a proper case for the court to exercise its discretion in favour of admission. The Attorney-General associated himself with the arguments of the Law Society. Counsel for the plaintiffs/respondents, Mr. Grimberg, who had appeared for them at the trial in Suit No. 503 of 1975, while associating himself with the Law Society and the Attorney-General, stated that in his view, this was not a proper case for the exercise of the court's discretion in favour of the application as the main issue in this case was whether on the exchange of certain telex messages between certain parties an agreement had been concluded as claimed between the plaintiffs and the defendants. In his view such matters were being dealt with constantly in our courts and should present no difficulty. If I understood him correctly he was perhaps telling me that one does not use a steamroller to crack a pea-nut. He further contended that the firm of Messrs. Rodyk & Davidson, who are and have been the solicitors for the appellants/defendants are well equipped and capable of arguing the appeal in all its aspects for the appellants.

There can be no question that the applicant has special qualifications and experience for the purposes of the appeal in question. Section 18 does not categorically set out the basis nor the criteria on which such ad hoc admissions are to be made. However, subsection 3 enjoins that, "Before admitting a person under the provisions of this section the court shall have regard to the views of each of the persons served with the application."

Counsel for the applicant put the case for the admission of the applicant under three heads, namely:—

(1) The law relating to the formation of ship repair contracts is of great complexity;

(2) The law relating to damages for breach of such contract is of great complexity; and

(3) The amount involved is substantial.

Having heard the views of each of the persons served with the application particularly those of the plaintiffs/respondents I am satisfied that heads (1) and (2) are not of that complexity as to be beyond the reach of Messrs. Rodyk & Davidson, who appeared for them in the first instance and that this was not a proper case where a person should be admitted under the provisions of section 18 of the Legal Profession Act (Chapter 217).

Application disallowed.

Solicitors: *Rodyk & Davidson; Drew & Napier.*

MALAYSIAN REPORTS

HO KOK CHEONG SDN. BHD. & ANOR. v. LIM KAY TIONG & ORS.

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman and Chang Min Tat F.JJ.)
November 6, 1978 and January 12, 1979]

[Kuala Lumpur — Federal Court Civil Appeal No. 82 of 1978]

Contract — Whether contract a conditional contract — Condition a term of contract — Specific performance — Contracts Act, 1950, s. 80.

In this case the first appellant had agreed to buy shares in the Perforated Plates Sdn. Bhd. for $780,890 from the respondents. A sum of $78,089 was paid as deposit. The balance of the purchase price was to be paid in six monthly instalments and full payment of the purchase price was guaranteed by the second appellant. Apart from the deposit no other payment was made. The respondents thereupon sued the first appellant for specific performance and the second appellant for payment of the balance of the purchase price, that is $702,801. The respondents applied for summary judgment. The appellants opposed the application and argued that there were triable issues. It was alleged that the contract was a conditional one, as the appellants had agreed to procure the release of the respondents from certain guarantees by the completion date. Counsel for appellants argued that so long as the condition precedent was not fulfilled there could be no specific performance. It was also argued that there was no mutuality in the contract and that with the appointment of receivership over the company it was not equitable to order specific performance. The learned trial judge rejected the arguments for the appellant and gave judgment for the respondents. The appellants appealed to the Federal Court.

Held, dismissing the appeal: (1) the contract in this case was not a conditional contract. The procuring of release from the guarantees was not a condition precedent but merely a term of the contract;

(2) there was mutuality in this case, as if the first appellant obtained the release of the guarantees he could compel the respondents to deliver the shares on payment;

(3) the company was not a party to the contract which was between two shareholders and therefore the contract did not affect the receivers.

Cases referred to:-

(1) *Heron Garage Properties Ltd.* v. *Moss & Anor* [1974] 1 W.L.R. 148.

(2) *Hawksley* v. *Outram* [1892] 3 Ch. 359, C.A.

(3) *Aberfoyle Plantations Ltd.* v. *Khaw Bian Cheng* [1960] M.L.J. 46; [1959] 3 All E.R. 910.

(4) *In re Sandwell Park Colliery Co.* [1929] 1 Ch. D. 277.

(5) *Smith* v. *Butler* [1900] 1 Q.B. 694.

(6) *Property and Bloodstock Ltd.* v. *Emerton* [1967] 3 All E.R. 321; [1968] Ch. 94.

(7) *Eastham (Inspector of Taxes)* v. *Leigh London and Provincial Properties Ltd.* [1971] 1 Ch. 871.

HIGH COURT.

V.P. Pradhan for the plaintiffs.

C.V. Das for the defendants.

Cur. Adv. Vult.

Wan Hamzah J.: The plaintiffs caused a specially indorsed writ to be served on the defendants, claiming against the first defendant for an order of specific performance of an agreement dated March 21, 1975 whereby the first defendant agreed to buy from the plaintiffs 557,779 shares in Perforated Plates Sdn. Bhd. for $780,890.60, of which a sum of $78,089 had been paid as a deposit, and claiming against the second

defendant (as guarantors) for the balance of the purchase price which has not been paid amounting to $702,801.60, with interest. The plaintiffs now apply for judgment, contending that there are no triable issues. The defendants oppose the application. They do not dispute the facts alleged in the statement of claim, but they raise certain legal issues which they say can be disposed of only by trial. I find that it is not necessary to hold a trial to dispose of the legal issues raised, and that all of the legal issues can be disposed of now on the basis of the facts which have been placed before the court and which are not disputed by the parties.

The agreement contains the following clause (clause No. 5): —

"The purchaser agrees and undertakes to ensure that by or before the completion of the purchase of the said shares the vendors are released as guarantors for the company under the guarantee duly executed by them and Dr. Low Kok Kong and Mr. Sit Hin Kin in favour of Malaysian Industrial Development Finance Bhd. and dated the 2nd day of May 1974 (hereinafter referred to as 'the First Guarantee Agreement') and also to ensure and undertake the release of Lim Kay Tiong and Lim Kay Kok as guarantors for the company under the guarantee duly executed by the said Lim Kay Tiong and Lim Kay Kok in favour of Malaysian Industrial Merchant Bank and dated the day of (hereinafter referred to as 'the Second Guarantee Agreement) and also to ensure and undertake the release of Lim Kay Kok and Lim Kay Hua under the guarantee duly executed by the said Lim Kay Kok and Lim Kay Hua, Low Kok Kong and the purchaser in favour of Messrs. Balfour Williamson and dated the 3rd day of September 1973 (hereinafter referred to as 'the Third Guarantee Agreement')."

The agreement also contains the following clause (clause No. 6): —

"The vendors hereby agree that the said shares and transfer deeds shall be delivered to the purchaser by Messrs. Ong Swee Keng & Co. on or before the date of completion against payment by the purchaser to Messrs. Ong Swee Keng & Co. of all monies due under this Agreement and also the confirmation from Messrs. Malaysian Industrial Development Finance Bhd. and Malaysian Industrial Merchant Bank and Balfour Williamson that the vendors, the said Lim Kay Tiong, Lim Kay Kok and Lim Kay Hua are duly released from their liability as guarantors under the First, Second and Third Guarantee Agreements."

It is not disputed that there is no confirmation from Malaysian Industrial Development Finance Bhd., Malaysian Industrial Merchant Bank or Balfour Williamson that the plaintiffs have been released from liability as guarantors under the three guarantee agreements. In fact it is not disputed that the plaintiffs have not been so released. Counsel for the defendants argued that release from the guarantees and confirmation of the release are conditions precedent, and since these conditions precedent have not been complied an order of specific performance cannot be made. I do not agree with this contention. It is the undertaking and obligation of the first defendant to procure for the plaintiffs release from the guarantees, and because the first defendant has failed to do so the plaintiffs could, if they wish, ask the court to direct the first defendant to perform this undertaking. Under the agreement, to procure release from the guarantees is not a condition precedent to be complied by the plaintiffs. In their affidavits the defendants have not alleged any excuse or justification for the first defendant's failure to obtain release from the guarantees, and therefore it is not right for the defendants (as their counsel did) to contend that the reasons for the failure to obtain the release are matters to be enquired into at a trial. In the defendants' affidavits it is not even shown that any attempt had been made by the first defendant to obtain release from the guarantees.

The agreement also contains the following clause (clause No. 14): —

"It is hereby agreed between the purchaser and the vendors that if the purchase price and interest thereon and all other monies payable by the purchaser under this Agreement is not paid and the confirmation of release from Malaysian Industrial Development Finance Bhd., Malaysian Industrial Merchant Bank and Balfour Williamson referred to in Clause 6 herein is not obtained within thirty (30) days from the date of completion the vendors shall have the option to forfeit the 10% deposit paid by the purchaser and in such an event the vendors shall forthwith refund all monies received from the purchaser in respect of the purchase which are in excess of 10% of the purchase price and upon such refund, the vendors and the purchaser shall be released from their respective obligation and liability in this Agreement."

The plaintiffs have not exercised option under clause 14 to forfeit the deposit. It is submitted by counsel for the defendants that when the purchase price has not been paid in accordance with the agreement and confirmation of release from the guarantees has not been obtained the only course open to the plaintiffs is to forfeit the deposit and the plaintiffs cannot sue the defendants for other remedies, and it was also submitted that if the plaintiffs refuse to exercise the option they take the risk of keeping the agreement alive after the date of completion. I do not agree with this contention. As I understand it, clause No. 14 gives option to the plaintiffs either to forfeit the deposit and refrain from proceeding with the sale of the shares or to treat the deposit as part payment of the purchase price and sue the first defendant for performance of the purchase and sale agreement and for other remedies available to him.

Counsel for the defendants again referred to clause 14 of the agreement and submitted that there was no mutuality with reference to that clause in that even if the first defendant duly made payments towards the purchase price there could not be any assurance that it could secure release for the plaintiffs from the guarantees, in which event the first defendant would not be in a position to compel the plaintiffs to deliver the shares. On this point I would like to stress again the fact that to obtain release for the plaintiffs from the guarantees is an obligation of the first defendant according to the terms of the agreement, and if the first defendant obtained the release and performed all of its other obligations under the agreement it could compel the plaintiffs to deliver the shares. In this respect there is in my opinion mutuality. I would like also to mention again that the defendants have not given any indication that the first defendant could not obtain the release due to a reason which was not a fault of its own.

It is contended by the defendants that by the agreement the first defendant was to acquire a controlling share and interest in Perforated Plates Sdn. Bhd., and the agreement has the effect of transferring the ownership of the company from one person to another and it is to be regarded as a take-over, acquisition or merger in law and therefore section 179 of the

Companies Act, 1965 must be complied with. It was submitted that since the parties have not taken action to comply with the section the agreement is illegal and unenforceable. Alternatively it was submitted that non-compliance with the section renders the said agreement voidable at the option of the first defendant and the option has yet to be referred to or exercised by the first defendant. According to the evidence (which is not disputed by the defendants) when the agreement was entered the first defendant was already holding 557,776 shares in the company out of a total of 1,430,000 issued shares. Thus at the time when the agreement was entered the first defendant already had the right to exercise more than one-third of the voting power at a general meeting of the company. The agreement did not have the effect of creating for the first defendant a right to exercise not less than one-third of the voting power, and therefore in my opinion there was no "take-over scheme" as contemplated in section 179, and there was no necessity for the parties to the agreement to take steps to comply with the section.

In 1974 the Government issued certain guidelines called "Guidelines for the Regulation of Acquisition of Assets, Mergers and Take-overs", which apply to the following proposals: —

(i) Any proposed acquisition by foreign interest of any substantial fixed assets in Malaysia;

(ii) Any proposed acquisition of assets of any interests, mergers and take-overs of companies and businesses in Malaysia by any means, which will result in ownership or control passing to foreign interests;

(iii) Any proposed acquisition of 15% or more of the voting power by any one foreign interests or associated group, or by foreign interests in the aggregate of 30% or more of the voting power of a Malaysian company and businesses;

(iv) Control of Malaysian companies and businesses through any form of joint-venture agreement, management agreement, and technical assistance agreement or other arrangements;

(v) Any merger and take-over of any company or business in Malaysia whether by Malaysian or foreign interests;

(vi) Any other proposed acquisition of assets or interests exceeding in value of $1 million whether by Malaysian or foreign interests.

The guidelines require that any of the above proposals should be submitted to the Foreign Investment Committee, Economic Planning Unit, Prime Minister's Department. It was submitted on behalf of the defendants that the guidelines apply to the agreement and the requirements of the guidelines have not been complied, and therefore the agreement is void and unenforceable as being in contravention of public policy, or alternatively the contravention renders the agreement illegal and unenforceable, or the non-compliance renders the agreement voidable at the option of the first defendant and the option has yet to be referred to or exercised by the first defendant. In my opinion the agreement is not a proposal of the kinds enumerated in the above list of proposals. The guidelines were issued not pursuant to any power given by law, and in my opinion they have no force of law but are of advisory character merely. I do not think that non-compliance with the guidelines can be taken as an act opposed to public policy. The guidelines reflect the Government's political policy, but Government's political policy is not public policy.

Under the articles of association of the Perforated Plates Sdn. Bhd. its directors may decline to register the transfer of any shares. Certain creditors of the company have appointed receivers of the property of the company. It is submitted on behalf of the defendants that the receivers step into the shoes of the directors and they may decline to register the transfer of the shares, and that the receivers are not a party to the present proceedings and therefore they would not be bound by the order asked for by the plaintiffs. Although under the articles of association the directors may decline to register they are bound to do so if directed by the court, and when the receivers have been appointed and stepped into the shoes of the directors they are similarly bound to register if so ordered by the court. Besides, the debentures pursuant to which the receivers have been appointed, do not empower them to refuse to register the transfer of shares.

It is submitted on behalf of the defendants that since the guarantee executed by the second defendant is without consideration and not under seal, it is of no effect. The answer to this is, in my opinion, section 80 of the Contracts Act which provides that anything done, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee. Besides, the second defendant is a director and shareholder of the first defendant and he himself stands to benefit from the consideration promised by the plaintiffs in the agreement with the first defendant.

Counsel for the plaintiffs informed me that the plaintiffs now waive their right to specific performance by the first defendant of the stipulation under clause 5 of the agreement and instead ask for damages for breach of the stipulation. I find that clause 5 is for the benefit of the plaintiffs solely and it is not for the benefit of the first defendant and it is severable from the rest of the agreement. Therefore the plaintiffs can waive such right.

Having given answers to the above questions in favour of the plaintiffs, I find no other issues which should be tried. I therefore grant leave to the plaintiffs to sign judgment against the defendants and I grant orders in terms of the amended minutes of proposed judgment submitted by counsel for the plaintiffs and initialled by me today.

From the above judgment the defendants appealed to the Federal Court.

FEDERAL COURT.

Lee Hun Hoe C.J. (Borneo): This appeal is against the learned judge in giving respondents/plaintiffs summary judgment against appellants/defendants.

By an agreement dated March 21, 1975 1st appellant agreed to buy from respondents 557,779 shares of $1 each fully paid in Perforated Plates Sdn. Bhd. for $780,890. A sum of $78,089 was paid as deposit. The balance of the purchase price was to be paid by six monthly instalments of $117,133.60 on the 21st of each month commencing on April 21, 1975 with interest at the rate of 14% per annum. By a guarantee 2nd appellant guaranteed full payment of the purchase price. Apart from the deposit no other payment was made. Consequently, respondents sued 1st appellant for specific performance and 2nd appellant for payment of $702,801.60 being the balance of the purchase price. Respondents applied for summary judgment contending that there was no triable issues. Appellants opposed the application. They did not dispute the facts alleged in the statement of claim but they raised certain legal issues which they claimed could only be disposed of by trial. The learned judge considered these legal issues could be conveniently disposed of on the basis of the undisputed facts before him. Having heard arguments on the legal issues he gave judgment for respondents.

Counsel for appellants raised four main points. The contract was a conditional one which had not become absolute therefore specific performance should not have been made. This was so as long as the condition precedent was not fulfilled the condition precedent was of such a nature that it could not be waived. That there was a lack of mutuality in the contract. Finally, that with the appointment of receivership over the company it was not equitable to order specific performance. All these have been dealt with by the learned judge in his usual careful manner.

The agreement contains sixteen clauses. Clause 1 states the shares to be sold and amount of deposit to be paid. Clause 2 indicates the place and date of completion not later than November 30, 1975. Clauses 3 and 4 deal with delivery of transfer documents.

Clause 5 provides: —

"The purchaser agrees and undertakes to ensure that by or before the completion of the purchase of the said shares the vendors are released as guarantors for the company under the guarantee duly executed by them and Dr. Low Kok Kong and Mr. Sit Hin Kin in favour of Malaysian Industrial Development Finance Bhd. and dated the 2nd day of May 1974 (hereinafter referred to as 'the First Guarantee Agreement') and also to ensure and undertake the release of Lim Kay Tiong and Lim Kay Kok as guarantors for the company under the guarantee duly executed by the said Lim Kay Tiong and Lim Kay Kok in favour of Malaysian Industrial Merchant Bank and dated the ..... day of ..... (hereinafter referred to as 'the Second Guarantee Agreement') and also to ensure and undertake the release of Lim Kay Kok and Lim Kay Hua under the guarantee duly executed by the said Lim Kay Kok and Lim Kay Hua, Low Kok Kong and the purchaser in favour of Messrs. Balfour Williamson and dated the 3rd day of September, 1973 (hereinafter referred to as 'the Third Guarantee Agreement')."

Under clause 6 the necessary transfer documents are to be delivered upon payment of purchase money and presentation of confirmation of release of vendors' guarantees. Clauses 7 and 8 are concerned with payments and interest. Clause 9 relates to the resignation of the vendors as directors upon payment of purchase price and receipt of confirmation of release of guarantees. Under clause 10 the purchaser ensures that the vendors shall remain directors until payment of the purchase price from the date of the agreement but they are to act as directed. Clause 14 relates to the question of forfeiture and reads: —

"It is hereby agreed between the purchaser and the vendors that if the purchaser price and interest thereon and all other monies payable by the purchaser under this agreement is not paid and the confirmation of release from Malaysian Industrial Development Finance Bhd., Malaysian Industrial Merchant Bank and Balfour Williamson referred to in Clause 6 herein is not obtained within thirty (30) days from the date of completion the vendors shall have the option to forfeit the 10% deposit paid by the Purchaser and in such an event the vendors shall forthwith refund all monies received from the purchaser in respect of the purchase which are in excess of 10% of the purchase price and upon such refund, the vendors and the purchaser shall be released from their respective obligation and liability in this agreement."

Appellants submitted that the sale of shares was conditional upon (a) payment of purchase price in full by the purchaser and (b) procuring the release of respondents from certain guarantees by the completion date. As clause 5 was only for the benefit or protection of the vendors it should be read with clause 9. A perusal of the agreement shows that clauses 11 and 12 were inserted for the protection of the purchaser. It was said that there could not be a sale if the vendors were to remain as directors. The obligations under the agreement are mutual. If the purchaser performs his part of the bargain the vendors would resign under clause 4 and the transfer could be affected. Indeed, the vendors had written to the purchaser that they were able, ready and willing to complete the agreement at all times but for the default of the purchaser to fulfill the obligation by paying the balance of the purchase price.

Referring to the provisions of clauses 5 and 6 the learned judge pointed out that there was no dispute that respondents had not been released as guarantors. It was the contention of appellants that the release from the guarantees and confirmation of release were conditions precedent. Since these conditions precedent had not been fulfilled specific performance could not be ordered. The learned judge answered this contention in these words: —

"I do not agree with this contention. It is the undertaking and obligation of the first defendant to procure for the plaintiffs release from the guarantees and because the first defendant has failed to do so the plaintiffs could, if they wish, ask the court to direct the first defendant to perform this undertaking under the agreement. To procure release from the guarantees is not a condition precedent to be complied by the plaintiffs."

In support appellants cited *Heron Garage Properties Ltd.* v. *Moss & Anor.*[1] where *Hawksley* v. *Outram*[2] was distinguished. The agreement in *Heron's* case was expressed to be conditional on the purchaser obtaining planning permission. Either party could determine the agreement if such permission was not obtained within certain period. When such permission was refused, the purchaser, purporting to waive the condition, claimed that the contract was, therefore, unconditional and called for completion. Held he could not do so unless the stipulation was for his exclusive benefit. In *Hawksley's* case defendants sold their textile business to plaintiff. Under the terms of the contract plaintiff was entitled to use the name of Benjamin Outram & Co. and to restrain defendants

from carrying on similar business within a radius of 50 miles. One of the defendants happened to be abroad at the time but had given a power of attorney to his brother who was also a defendant. Defendants defaulted in the due performance of the sale agreement and plaintiff sued for specific performance. The defence raised was that the power of attorney did not authorise the attorney to agree to grant the two rights to plaintiff. On the basis of plaintiff waiving his rights against the defendants, specific performance was granted. Although plaintiff was given the two rights he was not bound to exercise them. Thus, there was no reason why he could not abandon the rights embodied in the sale agreement if they imperilled the relief he sought. The planning consent in *Heron's* case was expressed as a condition fundamental to the enforceability of the sale agreement. It was clearly a conditional contract. The same cannot be said of the present case where each party was to perform certain obligations. These are not conditions but rather fundamental terms of the contract. Appellants considered that if they breached any term it was sufficient if the deposit was forfeited. On the other hand, respondents maintained that they were entitled to affirm the contract and seek appropriate remedies. The learned judge has expressed his view that the procuring of release from the guarantees is not a condition precedent. I think, with respect, he is right as it is merely a term of the contract.

The respondents had not exercised the option under clause 14 to forfeit the deposit. With respect, the learned judge was right to reject appellants' contention that as the purchase price had not been paid in accordance with the agreement and also as the confirmation of release from the guarantees had not been obtained the only course open to respondents was to forfeit the deposit and they could not sue for other remedies. There is no merit in the contention that the learned judge construed clause 14 wrongly. He was perfectly entitled to hold that this was not a conditional contract as appellants would have everyone believed it to be one. The learned judge expressed his views clearly that: —

"Clause 14 gives option to the plaintiffs either to forfeit the deposit and refrain from proceeding with the sale of the shares or to treat the deposit as part payment of the purchase price and sue the first defendant for performance of the purchase and sale agreement and for other remedies available to him."

I can see nothing wrong with this view since the learned judge did not agree that there was any conditional contract.

On the question of mutuality I can find nothing wrong with the view as expressed by the learned judge. Under the agreement the obligation was on 1st appellant to obtain for respondents the release of guarantees. If 1st appellant had carried out his obligations under the agreement he could compel respondents to deliver the shares. It is 1st appellant's privilege to keep to himself the reason for his inability to obtain the release. He would not have given an undertaking to do so in the first place if he felt he could not fulfil it.

On the appointment of receivers, appellants conceded that his submission in the lower court that the receivers stepped into the shoes of the directors was wrong. In fact, the receivers remain at all times the agent of the company. The contract is between two shareholders but affecting the company which is not a party to the contract. The receivers were appointed by the debenture holders. What was the power of the directors that was paralysed? Actually, it was the power of the directors to deal with the assets of the debenture holders that was paralysed. The shares in the contract already allotted are not the property of the company. Only unissued share capital is the property of the company. As the company is not a party to the contract the receivers can do nothing about the contract.

Reference was made to *Aberfoyle Plantations Ltd. Khaw Bian Cheng*[3] concerning a contract for the sale of property conditional on the vendor company obtaining the renewal of certain expired leases. Two cases, namely, *In re Sandwell Park Colliery Co.*[4] and *Smith* v. *Butler*[5] had been referred to. Counsel for appellants relied on a passage by Lord Jenkins at page 49 to support his point on the question of conditional contract: —

"Before parting with these two authorities their Lordships would observe that the reason for taking the date fixed for completion by a conditional contract of sale as the date by which the condition is to be fulfilled appears to their Lordships to be that until the condition is fulfilled there is no contract of sale to be completed, and accordingly, that by fixing a date for completion the parties must by implication be regarded as having agreed that the contract must have become absolute through performance of the condition by that date at the latest."

Counsel for respondents pointed out that the cases cited by appellants related to agreements which were "subject to" to some future event, performance or the like. In other words, the cases dealt with conditional agreements. This is not so in the present case. Under clause 5 the purchasers not only agreed but also undertook to obtain the release of the vendors' guarantees before the completion date. The learned judge was perfectly right to reject appellants' contention that the reason for the failure to obtain the release was a matter to be enquired at the trial. Appellants had actually said that they would get the release for the vendors and not that they would try their best to get it for them. Nothing was said about the contract being conditional or subject to obtaining the release.

In *Property and Bloodstock Ltd.* v. *Emerton*[6] the question for consideration was whether a contract for sale by a mortgage subject to the vendor's (mortgagee) obtaining the consent of the landlord to the assignment was a contract which barred redemption by the mortgagor thereafter. Ungoed-Thomas J. held that the mortgagor had no right to redeem the legal charge because of a subsisting contract of sale. The Court of Appeal upheld his decision holding that on the true construction of contract of sale and in particular of condition (f) obtaining the landlord's consent was not a condition precedent to the formation of a contract of sale and the creation of the relationship of vendor and purchaser between the mortgagee and the purchaser. *Aberfoyle's* case was distinguished.

In *Eastham (Inspector of Taxes)* v. *Leigh London and Provincial Properties Ltd.*[7] the appeal concerned an assessment of capital gains tax as a result of disposing of a capital asset acquired earlier at a profit. In 1962 the taxpayer entered into a contract with the owners of a site to put up a building within two years at a cost of not less than £270,000. It was agreed that on the completion of the building the taxpayer would be granted 125 years from 1962. In fact, the lease was granted in 1964. In 1965 the lease was assigned for £587,000. Held, dismissing the Crown's appeal, that the 1962 contract was not a conditional contract and that the land was acquired at the date of contract. At page 891, Buckley L.J. said: —

"That is not, in my judgment, a condition precedent to the contract at all, it is part of the terms of the contract. You may call it a condition if you please, but it does not make it a condition precedent to the existence of a contract, it merely indicates what is part of the terms of the bargain, just as in all contracts for sale the terms of the bargain are customarily described as conditions of sale."

The same thing was said by Danckwert L.J. in *Emerton's* case at page 324: —

"On the face of the document, the contract is an ordinary contract of sale and purchase, and although 'conditions' are referred to, the matters so referred to are merely the terms of the sale and purchase, and the contract would, in my opinion, not normally be regarded as a conditional sale and purchase."

In the present case any talk about conditions precedent or conditional contract is misleading. It is irrelevant and tends to cause confusion. The facts are clearly distinguishable from *Aberfoyle's* case. There the contract was conditional on the vendor obtaining a renewal of certain leases. As the condition precedent was not satisfied there was no contract of sale; the relationship of vendor and purchaser was not created. Hence, the purchaser was entitled to the refund of deposits. In the present case appellants said the vendors could keep the deposit. Clearly, the option to forfeit the deposit rests with the vendors under clause 14. If appellants were right there would be no contract of sale as a condition precedent had not been fulfilled and they should be entitled to refund of the deposit. The question whether the contract is conditional or not depends entirely on the interpretation of the sale agreement. The "conditions" agreed by the parties were nothing more than the terms of the contract. The fact that a "condition" is a term of a contract does not make it a conditional contract. There are no conditions precedent in the present case as understood in *Aberfoyle's* case. With respect, I can find no reason to interfere with the decision of the learned judge. Accordingly, I would dismiss the appeal with costs. Deposit to respondents on account of taxed costs.

Wan Suleiman and **Chang Min Tat F.JJ.** concurred.

Appeal dismissed.

Solicitors: *Shook Lin & Bok; Skrine & Co.*

TINDOK BESAR ESTATE SDN. BHD. v. TINJAR CO.

[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat and Syed Othman F.JJ.)
November 20, 1978 and January 19, 1979]

[Kota Kinabalu — Federal Court Civil Appeal No. 10 of 1978]

Contract — Contract in writing — Whether parol evidence admissible to prove implied undertakings in construing agreement — Illegality — Misrepresentation and Fraud — Whether parties in pari delicto — Evidence Act, 1950, s. 92.

Evidence — Contract in writing — Whether parol evidence admissible — Evidence Act, 1950, s. 92.

Land Law — Temporary Occupation Licence — Land used as road — Non-transferable — Whether permission to use road in breach of condition and illegal — Sabah Land Ordinance (Sabah Cap. 68).

Practise and Procedure — Pleadings — Amendment — Application made at hearing of appeal — Application dismissed — Federal Court (Civil Appeal) (Transitional) Rules, 1963 — R.S.C. 1957, O. 58 r. 4.

In this case the appellant had been employed as a contractor by a company for the extraction of timber. The appellant agreed to furnish the necessary vehicles and to provide the buildings for the accommodation of the workers and for other necessary purposes and also to build a road leading to and from the timber area. It bought vehicles on hire-purchase and applied for and obtained a Temporary Occupation Licence of land on which was constructed the road. Subsequently the appellant agreed to withdraw and agreements were made whereby the respondent undertook the work of extracting the timber and the appellant's agreement with the company was cancelled. The respondent thereupon entered into an agreement with the appellant whereby the respondent agreed to buy over from the appellant the vehicles at an agreed price subject to the payment of the remaining instalments of the hire-purchase to the hiror and paying an agreed sum for the appellant's infrastructure and the road. The respondents paid the amount due to the appellants under the agreements by instalments which were paid by post-dated cheques, the last of which for $45,000 was dishonoured. The appellant brought the action to claim the sum of $45,000 and interest. The respondents admitted giving the post-dated cheques but it challenged the validity of the agreement on the ground *inter alia* of illegality, fraud and misrepresentation. It counterclaimed for the sum of $90,000 which had been paid by it under the agreement to the appellant. At the trial in the High Court the learned trial judge dismissed the claim and allowed the counterclaim for the refund of $90,000 with interest and damages. He held that the entire agreement was tainted with illegality and it was not severable, that the respondent was not *in pari delicto* because its partners were in ignorance of the law and had acted under strong pressure and because of the fraudulent misrepresentations of the appellant. The learned Judge decided to admit parol evidence to prove the implied undertakings in construing the agreement and he then considered and found fraud and deceit on the part of the appellant. The appellant appealed.

Held, allowing the appeal: (1) the parol evidence was wrongly admitted by the trial judge as the evidence did not fall within either proviso (b) or proviso (c) of section 92 of the Evidence Act but was evidence adding a new term or terms to the agreement;

(2) on the facts the charges of fraud and misrepresentation against the appellant could not be sustained;

(3) the evidence sought to be adduced to show misrepresentation, deceit and fraud ranged far beyond the confines of the respondent's pleadings. The respondent's application to amend the pleadings must be disallowed, as it was made at the appellate stage and there was no good and strong justification for it;

(4) although the Temporary Occupation Licence is not transferable the statute does not prohibit the giving of permission to use the rights under it. In this case all the appellant did was to permit the respondent to use his rights under the Temporary Occupation Licence and there was nothing illegal about such an arrangement;